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Thirty-third session

SUMMARY RECORD OF THE 683rd MEETING

Held at Headquarters, New York,
on Thursday, 15 June 2000, at 3 p.m.

Chairman:

Mr. Jeffrey CHAN

(Singapore)

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470 and 472 and Add.1-4; A/CN.9/XXXIII/CRP.4)

1. Mr. KRONKE (Observer for the International Institute for the Unification of Private Law (UNIDROIT)), said that UNIDROIT, having prepared two draft texts on secured transactions, was conscious of the expectation of many countries that the cost of credit for infrastructure investments could be reduced through improvements in the legal framework for taking security. There was now a need to co-ordinate the draft UNIDROIT Convention on International Interests in Mobile Equipment with the UNCITRAL draft Convention on Assignment in Receivables Financing. The UNIDROIT draft would apply to secured transactions where security was taken in clearly delimited categories of high-value and extremely mobile equipment which was intended to cross borders on a daily basis or to be located outside any national territory. The assets to which it would apply were uniquely identifiable "associated rights". It would create a genuinely international interest, which if registered would give its holder priority, and the register would be based on assets, not debtors. In the past, the Commission had been reluctant to endorse the solution preferred by the UNIDROIT secretariat for coordinating its work with that of UNCITRAL, which was to exclude from the sphere of the UNCITRAL draft Convention the assignment of those few receivables which became "associated rights" by virtue of the financing arrangements proposed in the UNIDROIT draft Convention. However, its objections had been overcome through the definition of the mobile equipment to be covered by the UNIDROIT draft Convention, which was now confined to aircraft equipment, railway rolling stock and space property. UNIDROIT had set up three expert groups to deal with those types of equipment.

2. At a recent meeting of Government experts in Rome, it had been asked why, under the UNIDROIT system, the claim followed the security interest, instead of the other way round, as in most legal systems. The answer given by the UNIDROIT Rapporteur was that it would otherwise be necessary to deal with assignment, thus encroaching on the domain of the UNCITRAL draft Convention. The UNIDROIT text was now being finalized and would be put to a diplomatic conference in the near future.

3. He emphasized that manufacturers, buyers, financiers and the legal profession were looking to the work of both bodies for clarity and predictability in the law. It was important to avoid vague or ambiguous terminology. The best solution would be simply to exclude, in straightforward terms, the limited areas covered by the UNIDROIT draft from the scope of the draft UNCITRAL Convention.

4. Mr. WARSCHOT (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) explained that he was responsible for the working group on railways, which represented railway interests in Europe, North America and South Africa. His group shared the concerns of the working group on aviation regarding the compatibility of the provisions of the UNCITRAL draft Convention with a specified category of receivables, that of associated rights

in financed mobile equipment. Both working groups favoured the exclusion of those receivables from the scope of the UNCITRAL draft Convention.

5. Mr. STITES (Observer for the International Institute for the Unification of Private Law (UNIDROIT)) said that the working group on space objects, for which he was responsible, represented the global aerospace industry, satellite operators and the financial community. His working group took the view that space objects, like railway equipment, should be dealt with in protocols specifically covering such equipment.
6. Mr. BURMAN (United States of America) welcomed the collaboration of UNIDROIT and hoped that the respective interests of UNCITRAL and UNIDROIT could be clearly delimited in the two forthcoming instruments. Each text must respect the scope of application of the other, and for that purpose, the Commission should ensure that its own draft was free of complications. It was important to facilitate the financing of the transactions involved in international infrastructure.
7. Mr. MORÁN BOVIO (Spain) also expressed his appreciation of the work of UNIDROIT and its endeavours to co-operate with the Commission. The UNIDROIT draft Convention was much narrower in scope than the Commission's, but the problem remained of resolving contradictions between the two. There was a danger that the long-term financing system envisaged in the UNIDROIT draft would conflict with the short-term arrangements contemplated for receivables in the Commission's text. Because the receivables covered in the work of UNIDROIT were financed in a highly specific manner and had their own refinancing arrangements, they were in effect separated from the receivables covered in the Commission's own draft. In his Government's view, it was therefore unnecessary to exclude them from the Commission's text. He was anxious to know whether the UNIDROIT representatives perceived the two sectors as being different in nature and, if so, what the differences were with regard to instalments of payment.
8. The CHAIRMAN invited the Commission to resume its discussion of the additional definitions proposed by the European Banking Federation (EBF) (A/CN.9/472/Add.1, p. 12) for inclusion in article 6 of the draft Convention on Assignment of Receivables. The observer for Canada had suggested deleting from the proposed definition of "financial contract" the last phrase, which read "and any collateral or credit support related to any transaction referred to above".
9. Mr. WHITELEY (United Kingdom) said that his delegation was prepared to withdraw its original objection to the Canadian suggestion.
10. Mr. COHEN (United States of America) said that, subject to the change in the definition of "financial contract" just read out, his delegation fully supported the EBF definition of "netting agreement".
11. The CHAIRMAN noted that there seemed to be tentative agreement on the definitions of "financial contract" and "netting agreement" but little interest in considering further definitions. He therefore invited the Commission to resume discussion of the exclusion in subparagraph (ii) (F) of the United States proposal in document A/CN.9/XXXIII/CRP.4.

12. Mr. COHEN (United States of America) recalled that the previous afternoon the Secretary of the Working Group on International Contract Practices had suggested an alternative wording of "receivables arising from the sale or lease of real estate". His delegation would support that change, which would ably serve the purpose of avoiding conflict with long-standing local real-estate law.

13. Mr. STOUFFLET (France) said that he saw no problems in excluding receivables arising from a sale of real estate, but he had some doubts about the wisdom of excluding receivables arising from a lease. The securitization of future lease payments, particularly on commercial space, was a common method of financing for real-estate companies. Securitization of mortgages was also a growing practice. He did not see that their exclusion was justified.

14. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, although he had suggested new wording for the exclusion, he was not yet convinced that receivables from real estate should in fact be excluded. The problem appeared to be that the priority rule whereby the law of the assignor's location would apply to receivables arising from real estate would conflict with the normal rule in real-estate law whereby the law of the location of the property would apply. The observer for Canada had suggested the approach of devising a different priority rule for assignment of real-estate receivables rather than excluding them altogether. It also appeared that the draft Convention could usefully cover securitization of receivables secured by mortgages if the priority-rule problem was appropriately dealt with.

15. Mr. DOYLE (Observer for Ireland) said that his delegation supported the exclusion as redrafted. He had clear instructions that the industry in Ireland was unhappy about having the draft Convention apply to any aspect of real estate, including securitization of mortgages.

16. Ms. WALSH (Observer for Canada) said that her delegation would prefer a more qualified approach short of outright exclusion, so that securitization transactions on lease and mortgage payments could enjoy the benefits of the draft Convention other than the priority rule. Her delegation would be willing to propose language to that effect if the Commission wished.

17. Mr. BERNER (Observer for the Association of the Bar of the City of New York) noted that the exclusion as it stood mentioned only the sale or lease of real estate. Since many lawyers would not consider sale and mortgage to be the same thing, if the Commission wished the exclusion to cover mortgages as well, perhaps the wording should be "receivables arising from the sale, mortgage or lease of real estate".

18. Mr. MORÁN BOVIO (Spain) said that assignment of lease or rental payments accounted for a substantial movement of funds, and it would be advantageous for that market to be covered by the draft Convention. He wondered if the Irish objections to application of the draft Convention to real estate related to sale only or extended to lease receivables as well.

19. Mr. DOYLE (Observer for Ireland) said that his delegation was aware that the Commission worked by consensus and, having put its reservations on record, would not oppose any measure acceptable to the group as a whole. His

instructions had been to report that industry in Ireland would be unhappy with the application of the draft Convention to real property, and specifically with its application to securitization of mortgage receivables. He had no special instructions as to leases.

20. Mr. COHEN (United States of America) said that his delegation would like the exclusion to refer to the sale or lease of real estate, for two reasons. First, in the law of many States, rental or lease income was considered to be an interest in real estate and was covered by local law. Second, it was not always easy to distinguish lease from sale; many complex transactions called "leases" were, in economic reality, sales.

21. Ms. McMILLAN (United Kingdom) said that her delegation would prefer the exclusion of receivables from both the sale and the lease of real estate. If, however, there was a broad consensus not to exclude lease receivables, her delegation would agree, but only if the priority rule pertaining to them was altered.

22. Mr. SCHNEIDER (Germany) said that his delegation shared the concerns of the observer for Ireland and would like to have the wording of the clause specifically exclude receivables secured by mortgages.

23. Mr. MORÁN BOVIO (Spain) said that, if Governments had given delegations instructions concerning real estate, it was out of a concern to protect domestic real-estate systems. However, the draft Convention was designed for international use. The Commission should bear in mind the needs of construction firms planning large projects in developing economies. If their access to credit was restricted because they were not covered by the draft Convention, development would suffer. From that perspective, it was perhaps worthwhile to follow the suggestion of Canada and seek an accommodation of the rules applying to jurisdiction in order not to exclude such transactions from the benefits of the draft Convention.

24. Ms. WALSH (Observer for Canada) said that her delegation was not in favour of excluding receivables that took the form of rights to payment under a mortgage. Potential conflicts with local real-estate law could be dealt with through a relatively minor change in article 24 to the effect that the choice-of-law rule would apply without prejudice to a person with an interest in the land under the law of the jurisdiction where the land was located. In other words, if the competition for priority was between two assignees or an assignee and an insolvency administrator, the law of the assignor's location would continue to apply. But if the competition was between an assignee of the receivable and a claimant with an interest in the land who was entitled to priority under the law of jurisdiction where the land was located, the draft Convention would revert to the lex-situs rule.

25. Mr. DOYLE (Observer for Ireland) said that his delegation preferred the formulation that would exclude receivables arising from sale or mortgage of real estate. Traditionally, real property came under national law, and mortgages in his country were viewed as part of real property. Any alternative rule would be a fundamental deviation from Irish law and would make ratification of the draft Convention much more difficult. The wording proposed by the Association of the

Bar of the City of New York and supported by Germany would meet Ireland's concerns, whereas Canada's proposal did not, but his delegation would abide by the consensus of the Commission.

26. Mr. STOUFFLET (France) said that he heartily supported the proposal of Canada, which should be viewed, not as a compromise, but rather as the fruit of a remarkable legal analysis.

27. Mr. KUHN (Observer for Switzerland), supported by Mr. MEDIN (Observer for Sweden), said that his delegation supported the Canadian proposal. The Commission should be careful about excluding more from the draft Convention than was strictly necessary. In the important area of project financing, for example, many projects involved real estate, and the assignment of receivables flowing from them would therefore remain outside the draft Convention if the latter contained a wholesale exclusion of real estate.

28. Mr. COHEN (United States of America) said that his delegation would have to consider the Canadian proposal in writing before responding to it.

29. The CHAIRMAN said that there seemed to be general agreement on excluding sales of real estate but divided opinion on leases and securitization of mortgages.

30. Ms. WALSH (Observer for Canada) said that her delegation's proposal would work equally well for receivables arising from either leases or mortgages. Before the Commission considered article 24, her delegation would try to devise language applicable to one or the other or both.

31. Mr. BURMAN (United States of America) said that he wished to make the point for the record that most project-financing structures were deliberately designed so that the flow of receivables would not be tied to the real property and hence to local real-estate laws.

32. The CHAIRMAN invited the Commission to turn to consideration of exclusion (ii) (G) in the United States proposal (A/CN.9/XXXIII/CRP.4).

33. Mr. COHEN (United States of America) said that his delegation proposed excluding drawing rights or rights to payment under a letter of credit or independent bank guarantee because such receivables were covered by other international instruments and well-known rules, such as the Uniform Customs and Practice for Documentary Credits and the International Standby Practices (ISP98). The Commission should be wary of dealing with those categories in a way that would conflict with carefully elaborated systems.

34. The CHAIRMAN said that, in the absence of comment, the exclusion could be considered as meeting with tentative approval, and the Commission could move on to consideration of exclusion (ii) (H) of the United States proposal (A/CN.9/XXXIII/CRP.4).

35. Mr. COHEN (United States of America) said that although receivables arising from foreign-exchange contracts fell partly under subparagraphs (ii) (A) and (ii) (C) of his proposal, there were foreign-exchange contracts that did not fit

into either of the categories of regulated future exchanges or netting agreements. Nor were they well-suited to Convention rules, many of which would need to be re-examined if the receivables in question were not excluded. The foreign-exchange market was highly specialized and was already functioning well.

36. Mr. SCHNEIDER (Germany) asked for examples of receivables that had not been covered by the two other exclusions.

37. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) said that, although it had become common in the past several years for banks and their customers to conduct foreign-exchange transactions under ISDA Master Agreements, many transactions were still not governed by such documents. Banks, relying either on set-offs under local law or set-offs in bankruptcy, simply agreed to exchange currencies, confident that they could thus net all amounts payable to the customer against all amounts payable to them by the customer. If, however, any of those amounts were to become assignable to other creditors, thus interfering with netting, it would have a seriously deleterious impact on banks that were counting on having a total exposure to the customer on a net basis.

38. Mr. FRANKEN (Germany) observed, that even in the cases just described, banks could no doubt enter into agreements which, though not based on an ISDA or some other master agreement, provided for a netting procedure; in which case, transactions involving currencies would in fact be covered by financial contracts that came under the definition of a netting agreement.

39. Mr. DESCHAMPS (Observer for Canada), concurring, said that agreements such as foreign-exchange contracts between commercial banks and exporters contained netting provisions and therefore fell within the definition of a netting agreement under subparagraph (ii) (C) of the United States proposal. Consequently, subparagraph (ii) (H) was unnecessary.

40. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) said that many banks did indeed enter into foreign-exchange contracts with netting provisions. However, many foreign-exchange contracts were concluded on a Reuters dealing system, where confirmation contained merely the terms, with no provision for netting. Banks entering into such contracts were relying on statutory, not contractual, netting provisions.

41. Mr. MORÁN BOVIO (Spain) said that, having listened to the ISDA expert, he now favoured exclusion. The fact that such contracts were not always netting agreements might give rise to assignable credits, and the draft Convention should not cover such credits derived from foreign-exchange contracts. Although the transactions in question represented a very tiny market, it was a well-functioning and very particular one that should be excluded.

42. Mr. RENGEL (Germany) said that the more he heard, the more he was convinced that there was no logical reason for exclusion. Banks concluding foreign-exchange contracts had autonomy and complete freedom of contract and could add netting provisions if they wanted such transactions to fall outside the

Convention. The Commission needed a legal basis for excluding something from the draft Convention.

43. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) observed that the foreign-exchange market was actually very large: a total of 1.2 trillion dollars per day was traded, with economic results very crucial to the health of the world financial system. Foreign exchanges were conducted under a centuries-old system of contract operations. She urged the Commission to hesitate before adopting provisions that would upset the balance and liquidity of the financial markets.

44. Mr. WHITELEY (United Kingdom), agreeing with the German delegation that there should be justifiable reasons for all exclusions to the draft Convention, suggested that in the current instance one possible reason might be that certain States wanted to control transfers of foreign exchange and that a provision allowing assignment despite such controls would not be desirable. That was not currently a United Kingdom concern, although it had imposed such controls in the past.

45. Ms. McMILLAN (United Kingdom) drew attention to article 4 (2) of the draft Convention, which allowed Contracting States to list in a declaration all assignments to which the Convention would not apply. For the sake of consistency, that paragraph too should be deleted.

46. Ms. WALSH (Observer for Canada), referring to the first point made by the United Kingdom delegation, said that her delegation did not read the draft Convention as superseding national regulatory law on foreign-currency exchanges, money laundering and the like. The Commission would be revisiting those issues and making them explicit in draft article 9. As to draft article 4 (2), it was precisely because of the illogicality of allowing Contracting States to expand or contract the scope of the Convention at will that the text had been placed in square brackets.

47. Mr. STOUFFLET (France), noting that the foreign-exchange market was not the only one that dated back centuries, said that he agreed with the German delegation that logic and rationality had to be maintained, even in small matters. The Commission should not take a decision that would please a particular sector when there was no legally justifiable reason to do so.

48. Mr. DOYLE (Observer for Ireland), supporting the delegations of France and Germany, said that the Commission had set out to give receivables as wide a scope as possible and to exclude them only when there was an overwhelming reason for so doing. For instance, it had been clear that the draft Convention could not apply to bank deposits. On the other hand, the fact that the insurance industry did not wish insurance contracts to be covered by the draft Convention had not been deemed a sufficient reason; and the same applied to foreign-exchange contracts.

49. Mr. BERNER (Observer for the Association of the Bar of the City of New York) noting that the goal of the draft Convention was to break down barriers to increased global financial transactions, said that including foreign-exchange

contracts in the Convention did not appear to contribute in any way to that goal. Foreign-exchange operations had a long history, and there was no point in introducing uncertainty into well-established practice. By including foreign exchange contracts, the Commission would be discouraging parties from entering into such contracts because they would have to deal with a whole body of new law, with no compensatory contribution to international trade.

50. Mr. MORÁN BOVIO (Spain) said that, far from being useful to the foreign-exchange market, the draft Convention would hinder it by allowing assignment. That alone was legal reason enough for exclusion.

51. Mr. BURMAN (United States of America), recalling that the general purpose of the draft Convention as set out in the preamble was to promote the availability of international commercial credit to markets at more affordable rates, said that the Convention could make a particular difference in regions that had need of credit but a limited capacity to obtain it. That should be the Commission's litmus test for every provision. It was a question, not of providing rationales, but of serving industries.

52. The CHAIRMAN said that there was clearly need for more consultations on the issue. He would be interested in hearing further from the actual practitioners.

53. Mr. DUCARQIR (Observer for the European Banking Federation (EBF)) said that obviously the United States delegation had correctly stated the objectives of the draft Convention. If, however, the Convention could introduce useful rules, it should surely do so. He had received no mandate from Federation banks to argue for exclusion, and he therefore favoured inclusion.

54. Mr. PICKEL (Observer for the International Swaps and Derivatives Association (ISDA)) said that the foreign-exchange market was the single most efficient market in the world, trading a daily total of over a trillion dollars in all the world's currencies. In the process, it provided low-cost access to foreign exchange, and the goals of the preamble were thus being largely achieved already through the marketplace.

55. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that his delegation would feel more confident about inclusion if it heard how the draft Convention would benefit foreign-exchange transactions.

56. The CHAIRMAN said that the reverse situation applied. Since the Commission had in previous sessions taken a decision that the draft Convention should be applied as broadly as possible, the burden of proof fell on those who argued for exclusion. There was also the matter of draft article 4 (2), to which the United Kingdom had referred. It had originally been conceived as a safety valve of sorts, but the matter had still to be discussed.

57. Ms. GROSS (Observer for the International Swaps and Derivatives Association (ISDA) and the Financial Markets Lawyers Group) said that one of the most important benefits banks derived from netting was the opportunity to reduce their credit exposure to clients and reduce the capital they must maintain in the various countries in order to keep themselves strong. Chase Manhattan Bank, for instance, did \$3 trillion worth of transactions with counterparties, which,

through netting, could be reduced to an exposure of only \$30 billion. If, however, banks knew that their customers could assign receivables to counterparties, thereby destroying the mutuality necessary for netting, they would be required to maintain more capital for bank regulators, and internal credit exposure charges would in turn be higher, causing banks to raise their rates to their customers. Furthermore, if banks had to take steps to place the many transactions currently not covered by netting agreements under such agreements, that too would raise costs and ultimately would increase the banks' legal exposure and increase legal uncertainty. There were therefore very strong reasons why all foreign-exchange transactions should be excluded from the draft Convention.

58. Mr. FRANKEN (Germany) said he believed that the representative of ISDA was painting too dark a picture of the consequences of inclusion. Most substantial foreign-exchange transactions fell under agreements that contained a netting clause, so that the volume of transactions at issue was small. Also, one should never underestimate the inventiveness of banks: they were always able to circumvent problems. The clause in question would not cause the foreign-exchange market to collapse.

59. Mr. FERRARI (Italy) said that foreign-exchange contracts should be included in the draft Convention. The figures just given by the ISDA representative, presumably as an argument for exclusion, actually referred to transactions under netting agreements; but even if they did not, the market would not crash.

60. Mr. Al-NASSER (Observer for Saudi Arabia) observed that delegations had rightly referred to the importance of foreign-exchange contracts to developing countries. As an official of the Central Bank of Saudi Arabia, he himself had researched the reasons for delays in foreign-exchange transactions and had found that the main reason was the lack of an explicit foreign-exchange contract. Some countries maintained long-term contracts with banks in order to avoid currency-rates fluctuations. The issue had to be clarified and demystified. He urged the Commission not to exclude foreign-exchange transactions from the draft Convention.

61. The CHAIRMAN said that there was clearly a preference that foreign-exchange transactions should not be excluded.

62. He invited the Commission to consider exclusion (I) of the United States proposal (A/CN.9/XXXIII/CRP.4).

63. Mr. WINSHIP (United States of America) said that the proposal in subparagraph (I) for investment securities settlement systems had now been approved and combined with payment systems. However, subparagraph (I) also dealt with the sale or lending of investment securities, including repurchase agreements, known as repos. The transactions in question included investment security transactions which took place in well-established markets. Some rules in the draft Convention, especially the rules on priority, debtor protection and location, did not work well for such transactions. To apply the Convention to them would create uncertainty and would not be beneficial for the markets concerned.

64. The CHAIRMAN invited the Commission to decide whether the principle it had adopted for the previous exclusion should also apply in the present instance.
65. Mr. DESCHAMPS (Observer for Canada) supported exclusion of the rights specified in subparagraph (i), mainly because the law in that area was in a state of constant flux and national legislative systems were being amended to keep pace with it. Moreover, it was not certain whether the rules of private international law in the draft Convention were applicable to the law governing the sale of securities and securities entitlements. It also appeared that the Hague Conference on Private International Law was undertaking its own work on the topic. For those reasons, it seemed advisable to defer a decision on which rules of private international law were applicable to transactions of the type concerned.
66. Mr. RENGIER (Germany) said that the fear of impeding the operation of existing markets did not constitute a sufficient legal justification for excluding certain types of transaction from the scope of the draft Convention. If there was a need for exclusion, for instance because security investments were highly regulated under internal law, those concerns could be dealt with by way of the reservation formulated in draft article 4 (2), instead of a general exclusion clause.
67. Mr. MORÁN BOVIO (Spain) said that the solution contained in article 4 (2) was the least desirable one from the standpoint of the draft Convention. All of the Commission's efforts for the past few days had been aimed at preventing the list of exclusions from growing. The text itself must specify the limits of its own applicability.
68. The point was not simply that the repurchase agreements market was a well-functioning one. If the draft text was applied to that market, it could suffer distortions, particularly in the area of transferable securities. It did not seem appropriate to introduce a rule whereby the possibility of transferring securities through receivables deriving from securities should have absolute recognition as it did in the draft Convention. The primary advantage of the draft Convention was that it ensured that receivables were easily transferable. That brought it into direct conflict with many of the agreements in question, which frequently involved other aspects of the market. For those reasons, his delegation was in favour of maintaining the exclusion as reformulated.
69. Mr. FERRARI (Italy) said that his delegation was not in favour of dealing with the issue at hand by referring to article 4 (2).
70. Ms. KISSEDJIAN (Observer for the Hague Conference on Private International Law) said that the project to which the observer for Canada had referred was not a hypothetical one. The States members of the Hague Conference on Private International Law had taken a firm decision to launch the project at their Special Commission held in May. According to the expert presentations made on that occasion, not only national legislation but markets were in a state of flux. There were no established practices on the part of firms and of financial intermediaries which held securities. The fact that in Europe mergers were taking place not only between intermediaries but between stock exchanges would further complicate practice in that area. For those reasons, it would be

premature to establish any rule, even the one proposed by the Secretary of the Working Group, which delegations appeared to prefer.

71. The CHAIRMAN said that there appeared to be considerable support for the proposed exclusion in the Commission.

72. Mr. IKEDA (Japan) said that in the history of the Working Group, attempts had been made to exclude receivables in order to avoid conflicts stemming from the application of draft articles 11 and 12 to new banking operations. That should be kept in mind in evaluating the current proposal.

73. The CHAIRMAN suggested that it might be useful for the ad hoc discussion group to produce a new draft of the exclusions, incorporating the decisions reached after discussion, so that the Commission could compare what had been achieved with the proposals, in particular, variant B of draft article 5.

74. Mr. WINSHIP (United States of America) said he did not believe that his delegation's proposal was inconsistent with variant B.

75. The CHAIRMAN suggested that, in addition to a list of the exclusions arrived at after discussion of the United States proposal, a list could also be drawn up of the items not to be excluded, but to be tested against other provisions of the Convention, particularly draft articles 9 and 24. It was necessary to look at the text in its entirety in order to determine whether variant B was still needed and, if not, whether the text could stand on its own. If the Commission agreed to that approach, the discussion could be deferred until a text had been produced.

76. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices), summarizing the discussion on draft article 6, said that the location issues had been resolved; the definition of receivables financing had been put on hold, to be discussed in the context of the title and preamble of the draft Convention; subparagraph (H) of document A/CN.9/XXXIII/CRP.4 would be discussed in the context of the priority provisions; and the definition of trade receivables would be discussed only after the Commission had decided whether or not it would adopt variant B of draft article 5.

77. Ms. WALSH (Observer for Canada), referring to draft article 6 (k) (A/CN.9/470), suggested that the term "returned goods" should be excluded unless its meaning was clarified. Her delegation understood that the term was intended to refer to a situation where goods that were the subject of the original contract were returned by the other party to the contract, because they were defective, because the original contract was terminated, or because the goods were repossessed. The rationale for excluding such goods from the definition of "proceeds" was that it would be inappropriate to apply the choice-of-law rule, as set out in draft article 24, to proceeds which took the form of returned goods. She doubted, however, whether users of the draft Convention would understand that intention, given the summary language in which the subparagraph was drafted. Moreover, she questioned the need for such an explicit exclusion. Returned and repossessed goods were not proceeds of a receivable in the way in which such proceeds had been defined in the draft Convention.

78. Mr. SALINGER (Observer for Factors Chain International (FCI)) said that, in the minds of most factoring practitioners, returned goods constituted a large part of their recoveries from debtors and were in fact proceeds. If the factors did not have those proceeds, their risk increased enormously, as did the cost of their granting credit.

79. While he understood that there might be conflicts between the priority rules under the draft Convention and priorities from the standpoint of the laws of the State in which the goods were located, he believed that if the priority rules were applied once the proceeds had been returned to the State of the assignor, no conflict would ensue.

80. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the issue to which the previous speakers had referred was reflected in draft articles 16, 24 and 26. That issue had been discussed at length in the Working Group, and it might be preferable to consider the definition of "returned goods", as well as the priority rules, in the context of the relevant articles.

81. Mr. RINGER (Germany) said that the Commission had agreed that it would take up the proposal by the European Banking Federation concerning the definition of financial contract that was to be included in draft article 6. Moreover, with regard to the exclusions, the Commission had agreed in substance regarding inter-bank payment systems and security settlement systems. It was unclear whether definitions of those terms should also be included in draft article 6, as proposed by EBF.

82. The CHAIRMAN said that the previous speaker's question had been discussed when the Commission had considered the definitions in draft article 6.

The meeting rose at 6 p.m.



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Thirty-third session

SUMMARY RECORD OF THE 684th MEETING

Held at Headquarters, New York,
on Friday, 16 June 2000, at 10 a.m.

Chairman:

Mr. Jeffrey CHAN

(Singapore)

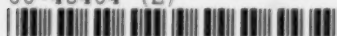
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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4); A/CN.9/XXXIII/CRP.4)

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, having completed its consideration of the list of practices or receivables that would be excluded from the scope of the draft Convention, the Commission needed to decide what to do with the list. The first alternative would be to exclude those practices or receivables from the scope of application of the draft Convention as a whole, either under article 2 or under article 4, and possibly exclude certain practices only from the scope of articles 11 and 12. The main argument against partial exclusions was that a limited exclusion from articles 11 and 12 would mean that the exclusion of the practices concerned would depend on the existence of an anti-assignment clause and on the effect given to that clause by the applicable law.
2. The second alternative, which already existed in article 5, variant B, was to limit the scope of articles 11 and 12 to assignments of trade receivables. The exclusion of those practices would then be left to the parties, which would have to ensure that the anti-assignment clause was subject to a law which gave effect to it.
3. The Working Group had also taken up the question of the definition of trade receivables. The Commission might wish to consider whether it would be easier to define trade receivables rather than all types of financial receivables.
4. A third alternative, which was identified in the commentary, would be to amend article 11. It seemed that the provisions of that article might not work well in a great many cases. Article 11 focused on trade receivables, especially future receivables and bulk assignments; however, in the case of future receivables, there was as yet no contract, and in the case of bulk assignments, there were hundreds of contracts. Article 11 could therefore be turned around so that it would give effect to anti-assignment clauses, thereby eliminating the uncertainty attached to having the effectiveness of anti-assignment clauses left to law applicable outside the draft Convention. There would then be a single exception, for trade receivables. That approach would meet the needs of practices where anti-assignment clauses were routinely included and put into effect.
5. The CHAIRMAN said that the Commission seemed to agree that there should be a general definition of what would be encompassed within the draft Convention, but that it was not desirable to have a list of inclusions. The question then arose whether the list of exclusions should relate to the whole of the draft Convention, or only to certain provisions. Finally, the Commission needed to decide whether it wished to change article 11 from a provision that negated anti-assignment clauses to one that confirmed such clauses, with the proviso that it would not apply to trade receivables.

6. Mr. WINSHIP (United States of America) recalled that the ad hoc group on exclusions had prepared an informal text on excluded transactions, which had been read out at the 682nd meeting. The group had decided to seek clarification from the Commission as a whole on the issue of assignments of receivables arising from the sale of land.
7. The ad hoc group had also reached agreement that the terms "financial contract" and "netting agreement" should be defined, and that the definitions should be those suggested by the European Banking Federation, in document A/CN.9/472/Add.1, except that in the definition of "financial contract", in article 6, paragraph (n), the words "any deposit transaction" and the phrase "and any collateral or credit support related to any transaction referred to above" should be deleted. The group had also clarified that inter-bank payment systems involving only two banks would not be covered by exclusion (D).
8. His delegation considered that the language suggested by the ad hoc group was acceptable, and believed that the approach of total exclusion was preferable, for the reasons it had already explained. If that approach was not acceptable to the Commission, each of the transactions would need to be considered in the context of article 5, variant B, so that the Commission could consider whether a lesser exclusion would be appropriate for any or all of them. The list could then be included under variant B. His delegation noted, however, that variant B might not be sufficient; on the previous day, it had drawn attention to the need to adapt other provisions, such as the provisions of article 24, with respect to some of the practices in the list.
9. Mr. IKEDA (Japan) said that the list of exclusions should relate to the draft Convention as a whole; it did not support the idea that assignments of some receivables should be partially excluded from the scope of the draft Convention.
10. Ms. GAVRILESCU (Romania) said that, if a list of exclusions was to be included in the draft Convention, it should be a list of total exclusions. Furthermore, it must cover receivables arising from the sale of land. In Romania, international land transactions were prohibited under the Constitution and under a special law. Since the objective of the draft Convention was to develop international trade, receivables arising from the sale of land must be excluded from its scope.
11. The CHAIRMAN said that the Commission needed to decide whether there should be a list of items which would be covered by the draft Convention. There had been strong support for the position that there should not be such a list, but a general statement of what would be included. Depending on how that statement was formulated, the items set out in article 4 (1) could either be included within the general statement or excluded from it. If they were excluded, there would need to be additions to the list of exclusions recommended by the ad hoc group. The group's recommendations related only to the list of exclusions proposed by the United States delegation (A/CN.9/XXXIII/CRP.4) and was premised on the assumption that there was an exhaustive list of inclusions.
12. Mr. MORÁN BOVIO (Spain) said that a list of inclusions did not seem appropriate, as the draft Convention could function rather well over a long

period of time with just a few clear exclusions. If the draft Convention did contain two lists, there might be problems with issues that were not defined. His delegation supported the list of exclusions suggested by the ad hoc group.

13. He agreed with the observer for Canada that receivables resulting from the sale of land could be dealt with by means of article 24, and should not be excluded under article 2.

14. The current trend in the securitization sector was to bring together receivables related to real estate and those relating to movable property, as the customers of credit agencies were very happy with the yields provided by those securities both for assignment transactions and the receivables resulting from them.

15. Mr. WINTHROP (United States of America) said that his delegation's original support for a list of inclusions reflected its very practical approach. Trade receivables, intellectual property receivables and loan receivables had seemed to be the basic core transactions that would benefit from uniform rules in the area of assignment of receivables. Other types of transaction might also benefit. There were also financial transactions, many of which appeared on the list of exclusions, which were already well established or unlikely to benefit from such rules. The uniform rules themselves did not work well with respect to the appropriate priority rule, representations, anti-assignments, and identification of location, and might actually be detrimental to certain existing or evolving markets. However, the Commission could start with those cases where the rules were clearly beneficial, and perhaps make additions to that list when necessary. After consultations with industry groups, his delegation had started with a more limited list of transactions, but had still gone beyond the 1988 UNIDROIT Convention on International Factoring by including, in addition to trade receivables, loans, credit facilities in certain limited circumstances, and receivables arising from intellectual property.

16. Despite the lack of support for that approach, it still seemed the most effective way of approaching the practical problems of the global market for receivables and the Commission might wish to consider that issue again after considering variant B of article 5, or when it had examined each of the potentially difficult areas.

17. Ms. GAVRILESCU (Romania) said that transactions relating to land should be added to the list of exclusions in the draft Convention. Otherwise, the text would contradict a very important provision in the national legislation of Romania.

18. If there was a list, it should naturally include all the exclusions to which the Commission had referred. If land transactions were not included on that list, her delegation could, as a last compromise, support retaining article 4 (2) in its present form in order to be able to exclude some situations that did not conform to Romanian law.

19. Mr. MEDIN (Observer for Sweden) said that consultations with Swedish industry had revealed a preference for variant B of article 5. Sweden had always been concerned that assignments of financial receivables did not fit in

the draft Convention and was grateful to the United States delegation for the list of transactions to be excluded. His delegation supported their exclusion from the draft Convention as a whole.

20. If assignments of financial receivables were indeed to be excluded from the draft Convention, his delegation would withdraw its support for the retention of articles 4 (2) and 39, as they would no longer be required for that purpose.

21. Finally, with regard to the sale of land, he had understood that the Commission was in favour of exclusion of transactions relating to the sale of land, except in the case of lease of lands or securitized mortgages.

22. Mr. DOYLE (Observer for Ireland) said that an inclusive list would contradict the idea that the draft Convention should have the widest possible scope. Also, the Commission could never be certain that it had included everything that was needed.

23. He shared the view of the Japanese delegation that transactions should either be excluded or not excluded from the draft Convention as a whole, and that the list of exclusions should therefore be added to article 4.

24. In relation to the exclusions from article 11, he agreed with the comment by Mr. Bazinas that article 5 should be worded so that articles 11 and 12 applied only to assignments of trade receivables.

25. Finally, with regard to land, he was not aware that any consensus had been reached. His own delegations favoured the broadest possible exclusion.

26. Mr. STOUFFLET (France) agreed that many national legislations imposed restrictions on sales of land and real estate to foreigners. With regard to the issue raised by the representative of Romania, he noted that the draft Convention dealt only with assignment of receivables arising from the sale of real estate. The sale existed only if the competent law recognized the validity of the contract of sale.

27. If the Commission were to add the exceptions listed by the ad hoc group to those already included in article 4, the list would be rather varied, including consumers together with extremely sophisticated financial institutions. That was a practical and acceptable solution, although not very elegant in terms of style.

28. Regarding the extent of the exclusions, multiple options (complete exclusion, exclusion from the application of articles 11 and 12, and exclusion from the application of texts on priority) would make the draft Convention too complicated. For practical purposes, his delegation would support complete exclusion, in a concern to give as wide a scope as possible to the draft Convention. If article 4 (1) was to contain a general exclusion formula, a list of receivables subject to the draft Convention could be given in the commentary.

29. Mr. SCHNEIDER (Germany) said that his delegation had no difficulty with assignments of receivables arising from the sale of land appearing on the list of exclusions, but was concerned about receivables secured by mortgages on land.

30. There were three different concepts in the various domestic laws on mortgages. Under one concept, the transfer of a receivable secured by a mortgage meant that the mortgage followed the transfer of the receivable. Under another concept, the receivable would follow the transfer of a mortgage. A third concept was that the mortgage was not an accessory right, so that the receivable could be transferred without transferring the mortgage. In the latter case, a loan might be transferred, but the mortgage would not follow. However, there would be an obligation in the underlying contract to transfer the mortgage. Thus different rules would be applied: the transfer of the mortgage would be dealt with under domestic law, and the transfer of the receivable would be dealt with under the draft Convention. Whatever concept or combination thereof was adopted, assignments of receivable secured by mortgages on land should appear on the list for exclusion from the draft Convention. A general exclusion under article 4 (1) would be preferable; if that was not acceptable, he would wish to retain article 4 (2) so that Germany could exclude such receivables under that article or under article 39.

31. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) noted that, if the proprietary effects of an assignment of a receivable relating to real estate were governed by the law of the location of the real estate transfer, they could not then be subject to any other law. With reference to the problem raised by the representative of Romania, it should be made clear that the draft Convention would not affect the rules of public policy with regard to, in particular, transfers of real estate. He wondered whether the different choice of law rule would meet the concerns of the Commission in that respect.

32. Ms. McMILLAN (United Kingdom) said that total exclusion from the Convention was the simplest method and the easiest to justify in terms of presentation and practice, as certain transactions in receivables were totally outside the scope of the draft Convention.

33. With regard to land, her delegation's concerns could be met in article 11. It would be difficult to persuade the United Kingdom authorities that there was any justification for excluding assignments of receivables arising from the sale of land while including assignments of receivables arising from the lease of land: leases in the United Kingdom often covered such a long time period that there was very little difference between a sale and a lease of land. Any interference with the national regime of land registration that governed priority would be extremely difficult to justify, and could make the draft Convention unacceptable to the authorities of her country. The Commission should consider the total exclusion of assignments of receivables arising from transactions in land. Articles 4 (2) and 39 weakened the Convention, as one would always need to check the status of different contracting States with regard to exclusions. A clear text that could be adopted or rejected was far preferable to a text that could be adopted with reservations.

34. Ms. STRAGANZ (Austria) was against the idea of an inclusive list. Any exclusion should be total, and she supported the views expressed by the German delegation in favour of the total exclusion of real estate under article 4 (1). She also shared the United Kingdom view that articles 4 (2) and 39 would result in a lack of transparency and thus weaken the Convention.

35. Ms. WALSH (Observer for Canada) recalled her earlier suggestion that the problem of assignments of receivables secured by an interest in land or arising from the lease or sale of land might be dealt with by a choice of law approach in article 24, which would preserve application of the law of the State in which the land was located. That approach would deal with the rare case of a conflict arising between an assignee of a land-related receivable and a person who had an interest in the relevant land.

36. Mr. Al-SAIDI (Observer for Kuwait) said that assignments of receivables arising under bank deposit relationships (subparagraph (C) of the ad hoc group's proposal) should not be excluded from the scope of the draft Convention since the bank might also be a debtor. The setting of limits on bank deposits was better left to the parties concerned.

37. In reference to subparagraph (E), he noted that some States did not allow foreigners to acquire real estate; the Secretary of the Working Group on International Contract Practices had been very clear in his comments on that matter.

38. Ms. WALSH (Observer for Canada) proposed the following addition to article 24: "If the assigned receivable arises from the sale or lease of an interest in land, or is secured by such an interest, the rights of the assignee are subject to any competing rights of a person who holds an interest in the land under the law of the State in which the land is situated."

39. Mr. IKEDA (Japan) said that he would prefer not to amend the current text of article 24; it would be better to seek a solution in articles 4, 6, 11 and 12.

40. Mr. AKAM AKAM (Cameroon) agreed with the representative of Japan.

The meeting was suspended at 11.30 a.m. and resumed at 12.15 p.m.

41. Mr. DESCHAMPS (Observer for Canada) explained that the exclusion of assignments of receivables secured by real estate mortgages would cause problems. Business loans were often syndicated and secured not only by the company's stock and receivables, but also by a mortgage on real estate. Thus, it would be arbitrary to exclude assignment of a receivable merely because it was secured by real estate. Furthermore, if an unsecured receivable was assigned and the debtor was later given a mortgage, the receivable would have been covered by the draft Convention at the time of assignment but would cease to be covered once the mortgage was taken out. To give yet another example, the comprehensive assignment of a company's trade receivables to a bank, which would be covered by the draft Convention, would fall outside the provisions of that instrument if the company issued a mortgage to its own clients since companies, in assigning their receivables to a bank as security, nevertheless retained the right to handle them.

42. Under the proposed text, when the assignment of receivables was secured by real estate, the provisions of the draft Convention (the law of the assignor's location) would apply. However, if the assignor assigned the receivable to a

third party who would have priority under real estate law, that law would take priority in case of conflict.

43. Mr. KUHN (Observer for Switzerland) said that he strongly supported the Canadian proposal.

44. Mr. MORÁN BOVIO (Spain) said that some years previously Spain had established a new real estate regime similar to that of the United States and Canada. Under that regime, real estate companies could sell receivables in the form of mortgages; such securitization provided a major source of financing for those companies. Thus, his delegation was categorically opposed to the exclusion of assignments of receivables arising from mortgages or the sale of land, and his Government would be unable to ratify the draft Convention if it contained such a provision.

45. Possible solutions, which were not mutually exclusive, would include: the deletion of all reference to real estate from the list of exclusions; the adoption of the Canadian proposal; or the lodging of reservations to those provisions by the States parties concerned.

46. Mr. DOYLE (Observer for Ireland) said that the Commission appeared to have reached an impasse. Therefore, while he would prefer the outright exclusion of real estate from the draft Convention, he was prepared to accept the Canadian proposal as a means of avoiding multiple reservations to the draft Convention upon its adoption.

47. Mr. WHITELEY (United Kingdom) said that he agreed with the delegations of Japan and France that article 24 might not be the best place for the rule in question. Also, it would be better to make an affirmative statement establishing that the location of real estate governed all matters relating to it. The solution might be to incorporate into article 25 a statement to the effect that, in such cases, priority should be given not to the law of the assignor's location, but to that of the jurisdiction in which the land was located.

48. Mr. STOUFFLET (France) said that the Canadian proposal might not fully meet the concerns raised by the Spanish delegation since, although it dealt with the matter of priority, it ignored the issue of foreign-owned mortgages on real estate located in the countries in question. Perhaps the wording of that proposal could be expanded along the lines indicated by the United Kingdom representative.

49. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that the securitization of mortgages, which had been introduced 20 years earlier, had had a dramatic effect on home ownership in the United States: mortgage rates were lower and more people owned houses than ever before. The draft Convention would go a long way towards extending those benefits to other parts of the world, particularly through the international recognition of bulk receivables. Adoption of the Canadian proposal would serve to improve the draft Convention still further; and there was no danger that practitioners would ignore local rules or sensibilities concerning real estate.

It was immaterial, from his point of view, whether the relevant provision appeared in article 24 or article 25.

50. Mr. Al-NASSER (Observer for Saudi Arabia) said that the Canadian proposal - which he preferred to that of the United Kingdom - provided a good basis for a compromise that took account of the concerns expressed by delegations whose national legislation differed as widely as that of Romania and Spain. Foreigners were not permitted to acquire or own real estate in his country, either; there was no question but that the law of the State where the real estate was situated should apply.

51. Mr. HERRMANN (Secretary of the Commission) hoped that the representative of Romania could clarify what in the draft Convention she found unacceptable. Romania barred foreign ownership and other countries placed limitations on it; but there was no contradiction between that position and the draft Convention. By definition, such countries would have no receivables which were owned by foreigners and thus subject to the draft Convention. A similar problem had arisen in relation to previous Commission texts, for example concerning the validity of transactions. National law, however, was paramount; if it excluded a particular practice, all other provisions were irrelevant. The concept of inclusion did not mean that all practices that were not excluded were valid in all circumstances. On the narrower question of receivables relating to real estate held by a Romanian national and assigned to another Romanian national, the provisions on priority in article 24 might be helpful.

52. Ms. GAVRILESCU (Romania) emphasized that the aim of her delegation was to achieve an outcome satisfactory both to countries which provided for the inclusion of real estate as a receivable and to those which did not. It was, however, important that the draft Convention should contain a provision - preferably in article 25 rather than article 24 - stating that any transaction relating to real estate should be governed by the law of the place where that real estate was situated. In the last resort, it was open to a State to lodge a reservation, as provided for under article 4 (2).

53. The CHAIRMAN invited the representative of the United Kingdom to inform the Commission of the precise terms of his delegation's proposal.

54. Mr. WHITELEY (United Kingdom) said that the text, which should constitute an additional paragraph to draft article 25, should read: "Where the assignment would transfer or create an interest in land, or a receivable arising from such an interest, the law of the State in which the land is located will govern the matters specified in article 24." It would be seen that the proposal was broader in scope than the Canadian proposal, which sought only to determine priorities.

55. Mr. SCHNEIDER (Germany) wished to dispel any impression that, when his delegation expressed concern with regard to any part of the draft Convention, it sought to destroy the markets. On the contrary, in the specific instance, mortgages had been of the utmost benefit to his country and others. The problem, however, was that a choice had to be made between two sets of rules: domestic legislation and the draft Convention. The latter did not apply to the special rules of assignments secured by mortgages, for example, so it was no

solution to add new provisions to articles 24 or 25. His preferred solution would be to exclude assignments of such receivables.

56. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that, from the outset, there had been no intention that the draft Convention should override statutory limitations under which real estate could not be assigned to foreigners. Indeed, that position was explicitly set out in document A/CN.9/470, paragraph 84.

57. Mr. BURMAN (United States of America) said that he wished to associate himself with the remarks by the representative of Germany, which expressed precisely why his delegation had suggested a list of exclusions. The issue of real estate was clearly a delicate one, however, and care should be taken in dealing with it. He suggested that the delegations of Canada and the United Kingdom should jointly add more precision to their proposals. The phrase "interest in land", for example, was too vague.

The meeting rose at 1.05 p.m.